

Department of Legislative Services
Maryland General Assembly
2009 Session

FISCAL AND POLICY NOTE

Senate Bill 417
Finance

(Senator Pugh, *et al.*)

Prescription Confidentiality Act

This bill prohibits a pharmacy benefits manager, “carrier,” “electronic transmission intermediary,” or pharmacy from licensing, transferring, using, or selling for any commercial purpose patient-identifiable or prescriber-identifiable information derived from or relating to a prescription.

Fiscal Summary

State Effect: To the extent the Department of Health and Mental Hygiene is required to enforce the bill, general fund expenditures increase by a potentially significant amount beginning in FY 2010. Potential minimal increase in general fund revenues and expenditures due to the bill’s penalty provisions.

Local Effect: Potential minimal increase in revenues and expenditures due to application of existing penalty provisions.

Small Business Effect: None.

Analysis

Bill Summary: “Carrier” includes an insurer, nonprofit health service plan, health maintenance organization, dental plan organization, third-party administrator, or any other person that provides State-regulated health benefit plans. “Electronic transmission intermediary” means an entity that provides the infrastructure that connects the computer systems or electronic devices used by prescribers, pharmacies, health care facilities, pharmacy benefits managers, and carriers or their agents to facilitate the secure transmission of prescription drug information.

The bill's prohibition does not apply to pharmacy reimbursement, formulary compliance, care management, utilization review, or health care research, nor does it apply if the information is not patient-identifiable or prescriber-identifiable and is aggregated by zip code, other geographic region, or medical specialty. The bill may not be construed to prohibit authorized dispensing of prescription drugs, transmission of prescription information between a prescriber and pharmacy, transfer of prescription information between pharmacies, transfer of prescription records in the event a pharmacy ownership is changed, or care management educational communications. Violations of the bill are subject to current penalties under the Maryland Food, Drug, and Cosmetic Act.

Current Law: A violation of the Maryland Food, Drug, and Cosmetic Act is a misdemeanor subject to a fine of up to \$10,000 and/or imprisonment for up to one year. Subsequent violations are subject to a fine of up to \$25,000 and/or imprisonment for up to three years. Additional civil penalties may apply.

Under the federal Health Insurance Portability and Accountability Act Privacy Rule "covered entities," including carriers, health care clearinghouses, and health care providers, may not use or disclose protected health information, except either as the privacy rule permits or as an individual authorizes in writing. Covered entities may disclose protected health information, without an individual's authorization for such purposes as treatment, payment, health care operations, and public interest activities. Not all entities that receive protected health information secondary or "downstream" to covered entities are subject to the privacy rule.

Maryland's Confidentiality of Medical Records Act requires health care providers and facilities to keep the medical record of a patient confidential and obtain written consent for disclosure. Generally, a person to whom a medical record is disclosed may not redisclose the medical record unless authorized by the person in interest. Exceptions are made for such purposes as provision of health care services, billing, utilization review, and legal claims.

An insurer is generally prohibited from disclosing an insured's medical records without written authorization. Exceptions include legal proceedings, coordination of benefits, reinsurance, renewal of insurance, and claims administration.

Background: In recent years, corporate data mining of personal health information has increased. Mined prescription drug information is used to determine offers of insurance and insurance rates, as well as to detail health care practitioners' prescribing patterns. Insurance carriers can purchase pharmacy history information on prospective clients through services such as Milliman's IntelliScript and Ingenix's MedPoint. With authorization from the prospective client, prescription information including drug, dosage, fill dates, pharmacy, and prescriber are electronically transmitted to insurance

company underwriters along with possible diagnoses and predictive risk assessments. Health care providers' prescribing practices can also be analyzed in great detail, most commonly for use in physician-directed marketing by pharmaceutical companies. These uses prompt concerns regarding patient privacy and the exertion of undue influence over providers.

Three states regulate the use of prescription drug information for commercial purposes. In 2006, New Hampshire became the first state to prohibit the sale or redistribution of prescription sales record information that identified patients or prescribers. Maine and Vermont enacted similar laws in 2007. Vermont requires physicians to opt-in if they wish their data to be shared with pharmaceutical companies, whereas in Maine, physicians must opt-out to prevent their data from being used for marketing purposes.

The data mining and pharmaceutical industries have sued these states on the basis that limiting the use of identifying information in prescription records restricts commercial speech rights protected by the First Amendment. In November 2008, the First Circuit Court of Appeals upheld the constitutionality of New Hampshire's law.

Additional Comments: A related bill, SB 130 of 2009, prohibits carriers from denying, canceling, or refusing to renew an individual health insurance policy solely based on the prescription drug history of an insured. SB 130 also restricts carriers' use of the contents of a prescription.

Additional Information

Prior Introductions: HB 50 of 2008 would have required the Secretary of Health and Mental Hygiene to establish a prescriber data sharing program to allow a prescriber to give consent for their identifying information to be used for marketing or promotion of prescription drugs. HB 50 was withdrawn before any action was taken on the bill. SB 266 of 2007 would have prohibited the transfer of identifying patient or prescriber information by specified entities, with exceptions if no payment is received for the transfer. SB 266 received an unfavorable report from the Senate Finance Committee.

Cross File: HB 1155 (Delegate Montgomery, *et al.*) – Health and Government Operations.

Information Source(s): National Legislative Association on Prescription Drug Pricing, Maryland Health Insurance Plan, Department of Health and Mental Hygiene, Maryland Insurance Administration, Department of Legislative Services

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